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No. 94-1039

In The

Supreme Court of the United States

October Term, 1994

Roy ROMER, as Governor of the State of Colorado, and the State of Colorado,

Petitioners,

v.

Richard G. EVANS, Angela Romero, Linda Fowler, Paul Brown, Priscilla Inkpen, John Miller, the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF AMICUS CURIAE OF JAMES E. ANDREWS AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.) IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

James E. Andrews, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.)

James E. Andrews, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 2,750,000 active members in 11,500 congregations organized into 171 presbyteries under the jurisdiction of 16 synods.

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

Since 1977, General Assemblies of the Presbyterian Church (U.S.A.) have stood firmly in support of equal rights for homosexual persons under the law. These statements include a call for just treatment of homosexual persons in regard to their civil liberties, for civil rights in housing, employment, and public accommodations, and vigilance against laws that discriminate against persons on the basis of sexual orientation. In 1993, the 205th General Assembly of the Presbyterian Church (U.S.A.)

"unequivocally condemn[ed] all discriminatory legislation, such as is exemplified by Article 2, Section 30 (Amendment 2) of the Colorado Constitution. . . . "

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case in the Brief of Respondents.

SUMMARY OF THE ARGUMENT

Since 1977, General Assemblies of the Presbyterian Church (U.S.A.) have opposed discrimination against homosexual persons with regard to their basic civil liberties. The same General Assemblies which have declared the practice of homosexuality is sin have also declared that federal, state, and local legislation which discriminates on the basis of sexual orientation must be vigorously opposed. Amendment 2 is such legislation.

Amendment 2 violates the United States Constitution because it violates the Equal Protection Clause of the Fourteenth Amendment which guarantees the fundamental right to participate equally in the political process to all citizens. In addition, Amendment 2 violates the Establishment Clause of the First Amendment; it is the exclusive province of religious institutions to determine what is sinful and immoral conduct, and the State must not entangle itself in such decisions.

The majority may not deny a particular minority an effective voice. Through its predecessor bodies, the Presbyterian Church (U.S.A.) predates the United States of America. General Assemblies of the Presbyterian Church (U.S.A.) have met annually in the United States since 1789. Through its polity, the Presbyterian Church has always strived to ensure the rights of the minority are protected from the tyranny of the majority. The minority rights of voice and access are guaranteed within the Presbyterian Church by its historic principles which are articulated in its constitution. No less should be expected from the civil government.

ARGUMENT

I. THE PRESBYTERIAN CHURCH (U.S.A.) GENERAL ASSEMBLY SUPPORTS BASIC CIVIL LIBERTIES FOR HOMOSEXUAL PERSONS

On November 3, 1992, a majority of voters in the State of Colorado approved a measure known as Amendment 2, which was an amendment to the State's constitution. The text read as follows:

> **No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation.** Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or

> class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

The effect of this amendment is to deprive homosexual persons of equal access to government and the benefits and protections government may confer. In light of Amendment 2's heavy burden upon homosexual persons' civil liberties, it is vital that this Court know of this *Amicus'* support of equal rights laws. The Presbyterian Church (U.S.A.) and its predecessor churches[1] have firmly and consistently recognized and supported Biblical principles of justice and equity for all persons, including homosexual persons, as demonstrated by Jesus who welcomed and loved all.

The Presbyterian Church (U.S.A.) disapproves of homosexual behavior, particularly with respect to ordained officers of the Church, and has declared that "homosexuality is not God's wish for humanity."[2] The General Assembly has declared that "the practice of

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[1] The Presbyterian Church (U.S.A.) was formed in 1983 upon the reunion of the two largest Presbyterian churches in the United States: the Presbyterian Church in the United States and the United Presbyterian Church, U.S.A. The General Assembly is the highest governing body in the Presbyterian Church. Predecessor General Assemblies have met in what is now the United States since 1789. Citations to General Assembly statements in this brief use the names of the former churches. Upon reunion in 1983, it was determined the General Assembly statements of the merging churches would continue in force as statements of the Presbyterian Church (U.S.A.).

[2] *Minutes of the 190th General Assembly, United Presbyterian Church, U.S.A.* (1978) Part I, at 264.

homosexuality is sin."[3] Nevertheless, these same pronouncements call for such activity to be treated as matters of private conduct protected from governmental intrusion. The Presbyterian Church has consistently sought to reserve such matters for moral and theological dialogues. Beginning in 1977, predecessor bodies of the Presbyterian Church (U.S.A.) have called upon their members and civil government to ensure the civil liberties and equal rights of homosexual persons:

> *Vigilance must be exercised to oppose federal, state, and local legislation that discriminates against persons on the basis of sexual orientation* and to initiate and support federal, state, or local legislation that prohibits discrimination against persons on the basis of sexual orientation in employment, housing, and public accommodations.[4]

> The 117th and 118th General Assemblies asserted *"the need for the church to stand for just treatment of homosexual persons in our society in regard to their civil liberties, equal rights and protection under the law from social and economic discrimination, which is due all its citizens."*[5]

The 199th General Assembly of the Presbyterian Church (U.S.A.) called for the elimination "of laws governing the private sexual behavior between consenting

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[3] *Id.*

[4] *Minutes of the 190th General Assembly, United Presbyterian Church, U.S.A.* (1978) Part I, at 265 (emphasis added).

[5] *Minutes of the 119th General Assembly, Presbyterian Church in the United States* (1979) Part I, at 208 (emphasis added).

adults" and the passage "of laws forbidding discrimination based on sexual orientation in employment, housing, and public accommodation. . . . "[6]

In 1993, the 205th General Assembly of the Presbyterian Church (U.S.A.) specifically addressed Amendment 2:

> Whereas, the state of Colorado passed a state constitutional amendment on November 3, 1992, which abrogates all laws that protect people against discrimination on the basis of sexual orientation; and
>
> Whereas, this incident is the first time ever a state constitution has been amended to prevent antidiscrimination laws protecting a particular class of people; and
>
> Whereas, political action groups in various states are using the successful passage of Amendment 2 in Colorado as a model for discriminatory laws, therefore, be it
>
> *Resolved*, That the 205th General Assembly (1993) unequivocally condemns all discriminatory legislation, such as is exemplified by Article 2, Section 30 (Amendment 2) of the Colorado Constitution.[7]

The Presbyterian Church (U.S.A.) calls upon this Court to consider the moral, ethical, and religious ramifications of this discriminatory amendment to Colorado's

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[6] *Minutes of the 199th General Assembly, Presbyterian Church (U.S.A.)* (1987) Part I, at 776.

[7] *Minutes of the 205th General Assembly, Presbyterian Church (U.S.A.)* (1993) Part I, at 118-119.

constitution. The Church's theology and the General Assembly policy statements cited above move it to oppose legislation such as Amendment 2.

II. AMENDMENT 2 VIOLATES THE UNITED STATES CONSTITUTION

A. THE EQUAL PROTECTION CLAUSE

In both its preliminary injunction ruling, *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (*"Evans I"*), and its permanent injunction ruling, *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) (*"Evans II"*), the Supreme Court of Colorado noted that Amendment 2 violates the Equal Protection Clause of the Fourteenth Amendment. Specifically, the Equal Protection Clause guarantees the fundamental right to participate equally in the political process and Amendment 2 violates that right. *See contra Equality Foundation v. City of Cincinnati*, 1995 U.S. App. LEXIS 10462 (6th Cir. 1995).

As noted by the Colorado Supreme Court, Amendment 2 did not merely "withdraw antidiscrimination issues as a whole from state and local control, Amendment 2 singles out one form of discrimination [against homosexuals] and removes its redress from consideration by normal processes." *Evans I*, 854 P.2d at 1285. Enforcement of Amendment 2 would mean that gay men and lesbians are left out of the political process and denied an effective voice in governmental affairs. "[N]ormal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them." *Id.*

Government cannot target a particular group of citizens for selective treatment or exclusion from the political process. "[T]he Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and . . . any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny." *Id.* at 1282 (footnote omitted). This is not a new constitutional principle arising from judicial consideration of anti-homosexual initiatives. The principle of equal access to government is fundamental to the American political process and has been recognized and championed by the United States Constitution and the United States Supreme Court.

In *Hunter v. Erickson*, 393 U.S. 385 (1969), this Court struck down a city charter amendment passed by a majority of the voters in Akron, Ohio. That amendment prohibited the city council from implementing any ordinance dealing with racial, ancestral, or religious discrimination in housing without the approval of a majority of Akron voters. The *Hunter* Court ruled that the state may "no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 393 (citations omitted) *quoted in Evans I* , 854 P.2d at 1279. Likewise, in *Washington v. Seattle School District*, 458 U.S. 457 (1982), this Court overturned a statewide initiative which prohibited the use of busing to achieve integration. The Fourteenth Amendment reaches a political structure that distorts governmental processes in such a way as to

place particular burdens on the ability of minority groups to achieve beneficial legislation. *Id.* at 467 *cited with approval in Evans I*, 854 P.2d at 1280.

As in Akron, Ohio and the State of Washington, the majority of the electorate in Colorado identified a small, unpopular group of citizens, *Evans II*, 882 P.2d at 1346 ("societal message condemning gay men, lesbians, and bisexuals as immoral") for an especial burden – a burden of separation from government and any benefits it could provide:

> The "ultimate effect" of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures. In the absence of such a constitutional amendment, any governmental entity would be acting contrary to the state constitution by "adopting, enacting, or enforcing" any such measure.

Thus, the right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the

electorate through the adoption of a constitutional amendment.

Evans I, 854 P.2d at 1285 (footnote omitted).

Amendment 2 strikes at the heart of the right to participate equally in the political process. Prior to Amendment 2, homosexual Coloradans and their supporters were free to lobby state and local government for protection from discrimination on the basis of their sexual orientation. *Evans II*, 854 P.2d at 1286. As with other groups seeking other goals, the homosexual community could appeal to government officials and administrators. This process, of course, is fundamental to the American governmental system. It plays out across our nation each day – on the local, state, and federal levels.

Amendment 2, however, changes the means by which homosexual citizens may petition their government. For this particular group, the doors to all government offices are closed. Instead, to secure any statute, ordinance, rule, or policy whatsoever, they must first pass an amendment repealing or changing Amendment 2. Moreover, they must secure such an amendment from the very voters who adopted Amendment 2. To obtain even the most basic benefit from their government, these citizens must put their request to the very majority that deprived them of governmental access in the first place. "Such a structuring of the political process undoubtedly is contrary to the notion that '[t]he concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.' " *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963) *quoted in Evans I*, 854 P.2d at 1285.

As the 1978 General Assembly prophetically stated, "Vigilance must be exercised to oppose federal, state, and local legislation that discriminates against persons on the basis of sexual orientation. . . . There is no legal, social, or moral justification for denying homosexual persons access to the basic requirements of human social existence. . . . "[8] Today, over 15 years later, the General Assembly continues to call for basic civil rights for homosexual persons.

B. THE ESTABLISHMENT CLAUSE

Governmental regulation of the activities of the community occasionally involves certain points of contact between governments and religious organizations. These points of contact, by themselves, are not prohibited under the Constitution. *See Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). "Fire inspections, building and zoning regulation, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts." *Id.* At times, however, governmental institutions may unnecessarily entangle themselves in questions of a primarily religious character with no proper secular purpose. When a governmental entity pursues legislation lacking in secular purpose, whose principal or primary effect advances religion or a particular religious point of view, and which fosters "an excessive government entanglement with religion," such legislation violates the

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[8] *Minutes of the 190th General Assembly, United Presbyterian Church, U.S.A.* (1978) Part I, at 265.

Establishment Clause under the test formulated by this Court in *Lemon*.

The issue of homosexuality in society and the propriety of homosexual activity is one of the most divisive issues within the American religious community today. Religious bodies now manifest a spectrum of response to homosexuality ranging from total acceptance to virulent denunciation. An ideal example of these widely varying religious views are the various religious *amicus curiae* briefs before this Court.[9] To the extent that the State of Colorado's Amendment 2 excludes and punishes homosexual persons, the State impermissibly entangles itself in this theological debate continuing among and within religious bodies. The State of Colorado must abstain totally from this religious debate.

Indeed, in their own brief in support of the State, Petitioners' Religious *Amici* acknowledge that the morality of homosexuality is

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[9] On the one hand, *Amici* Christian Life Commission of the Southern Baptist Convention, Lutheran Church – Missouri Synod, and the National Association of Evangelicals support Amendment 2 based upon their religious and theological understandings. On the other hand, *Amici* American Friends Service Committee, American Jewish Committee, Federation of Reconstructionist Congregations and Havurot, The Most Reverend Edmond L. Browning, Presiding Bishop of the Episcopal Church, Reconstructionist Rabbinical Association, Unitarian Universalist Association, United Church of Christ Office for Church in Society, and United Synagogue of Conservative Judaism oppose Amendment 2 based upon their theological understandings and responsibility to provide moral guidance to the community. *See also Respondents' Religious Amici Curiae Brief.*

> the subject of impassioned discussion within religious denominations, local churches, the religious social-service sector, and other ecclesial organizations such as seminaries and religious universities. Theologians, clerics, and laypersons all participate in the debate, and on both sides. Because it confronts religious belief and church autonomy, homosexual practice is a matter which the First Amendment ensures that the confessional communities may work out for themselves and in their own time.[10]

Ironically, after acknowledging the debate and stating that each religious community must work out its position in its own time, Petitioners' Religious *Amici* fully embrace and endorse the State's interference through its adoption of Amendment 2.

Not content with the freedom to exercise religion guaranteed by local exemptions, by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, and by the First Amendment, Petitioners' Religious *Amici* strike far beyond the principle of free exercise and employ the power of the State to enforce their morality in the society at large. In so doing, they seek to breach the wall of separation between church and state and apply their own moral precepts with the force of civil law. Government must not intervene to settle what are moral, religious, and theological controversies. This Court warned about governmental intrusion into religious disputes in *United States v. Ballard*:

> The Fathers of the Constitution were not unaware of the varied and extreme views of

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[10] *Petitioners' Religious Amici Curiae Brief* at 3-4.

> religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views.

322 U.S. 78, 87 (1943).

Religious exemptions in local ordinances, the Religious Freedom Restoration Act, and the First Amendment carefully and scrupulously preserve all of the free exercise rights religious bodies are due. To provide even more, as urged by Petitioners' Religious *Amici* and brought to bear by Amendment 2, violates the First Amendment's Establishment Clause. Predating both the United States Constitution and its Bill of Rights, *amicus* Presbyterian Church has stood firm by this guiding principle: "We ask no ecclesiastical establishments for ourselves; neither can we approve of them when granted to others." *Hanover Presbytery's Memorial to the Virginia Legislature* (Oct. 7, 1776). Today, over 200 years later, this basic principle remains true.

III. THE MAJORITY MAY NOT DENY A PARTICULAR MINORITY AN EFFECTIVE VOICE

"Amendment 2 expressly fences out an independently identifiable group." *Evans I*, 854 P.2d at 1285. The effect of Amendment 2 is to allow the majority (those who voted in favor of Amendment 2) to deprive an identifiable minority (homosexual people) of any meaningful input on issues dramatically affecting many

aspects of their lives. This is not constitutionally permissible: " 'A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.' " *Evans II*, 882 P.2d at 1350 (quoting *Lucas v. Colorado General Assembly*, 377 U.S. 713, 736-37 (1964)).

Since the inception of Presbyterianism in the United States, the Church's polity has consistently provided for government by elected representatives who recognize that the will of the majority shall prevail, but the rights of the minority shall be protected.[11] In its constitutional expression of Historic Principles the denomination affirmed "the orderly way by which the church handles conflict so that the rights of the minority are protected from the tyranny of the majority and, at the same time, the rights of the majority are protected from [being paralyzed by] the intransigence of a minority."[12]

In the Church's system of polity, as in the secular courts, the rights of the minority are carefully protected within the constitution and by the procedures of the Presbyterian Church (U.S.A.). The minority has "every reasonable right to press their case to try to persuade the majority of the church to their point of view."[13] Presbyterians have long recognized the value of preventing the majority from denying the minority " 'an effective voice

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[11] *Book of Order, Presbyterian Church (U.S.A.)* (1993-1994) G-1.0400. The Book of Order sets out the form of government, directory for worship, and rules of discipline for the Presbyterian Church (U.S.A.).

[12] *Minutes of the 195th General Assembly, Presbyterian Church (U.S.A.)* (1983) Part I, at 152-53.

[13] *Id.* at 156.

in the governmental affairs which substantially affect their lives'." *Evans I*, 854 P.2d at 1277 (citing *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969)).

Allowing the implementation of Amendment 2 will permit the majority of citizens to deny a specific minority (homosexual persons) an effective voice in government and will foreclose legislative redress for them. Amendment 2 will thus have far-reaching effect on virtually every aspect of the lives of a special group of citizens. Such a denial of access to the political process and fencing-out is contrary to the fundamental values of justice and fairness so long and highly-valued by the citizens of these United States. We call upon this Court to prevent this amendment from effectively depriving a particular group of persons of the rights due all citizens.

CONCLUSION

The Colorado Supreme Court's ruling carefully preserves for all the citizens of Colorado the equal protection of the law. For the foregoing reasons, the ruling of the Colorado Supreme Court should be affirmed.

Respectfully Submitted,

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